

STANDARD CRIMINAL 22
LESSER-INCLUDED OFFENSE

The crime of [_____] includes the lesser offense of [_____].
You may consider the lesser offense of [_____] if either

1. you find the defendant not guilty of [insert the greater offense]; or
2. after full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of [insert the greater offense];

You cannot find the defendant guilty of [insert the lesser offense] unless you find that the State has proved each element of [insert the lesser offense] beyond a reasonable doubt.

SOURCE: RAJI (Criminal) No. 22; *State v. LeBlanc*, 186 Ariz. 437, 439-440, 924 P.2d 441, 443-444 (1996).

USE NOTE: In determining whether an instruction on a lesser-included offense is proper, the Arizona Supreme Court has set forth a two-part test: (1) whether the offense is a lesser-included offense of the crime charged, and (2) whether the evidence otherwise supports the giving of the instruction. *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989), *cert. denied*, 497 U.S. 1033 (1990); *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983).

To determine whether a lesser-included offense instruction is warranted, the trial court may consider whether by its very nature the included offense is always a constituent part of the greater offense or whether the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the greater offense. *State v. Gooch*, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984); *State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994).

As a general rule, a defendant is entitled to a lesser-included offense instruction if there is evidence from which the jury could convict on the lesser offense and find that the State failed to prove an element of the greater offense. *State v. Jansing*, 186 Ariz. 63, 68, 918 P.2d 1081, 1086 (1996); *State v. Ruelas*, 165 Ariz. 326, 328, 798 P.2d 1335, 1337 (App. 1990); *State v. Conroy*, 131 Ariz. 528, 532, 642 P.2d 873, 877 (App. 1982). The evidence supporting the lesser-included offense may be circumstantial and it may be in dispute. *State v. Cousin*, 136 Ariz. 83, 87, 664 P.2d 233, 237 (App. 1983).

When the record is such that the defendant is either guilty of the crime charged or not guilty, the trial court should refuse to give a lesser-included instruction. *State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996); *State v. Salazar*, 173 Ariz. 399, 408, 844 P.2d 566, 575 (1992), *cert. denied*, 509 U.S. 912 (1993); *State v. Williams*, 144 Ariz. 479, 486, 698 P.2d 724, 731 (1985); *State v. Gendron*, 166 Ariz. 562, 566, 804 P.2d 95, 99 (App. 1990).